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In the Supreme Court of the United States

OCTOBER TERM, 1979

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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OPINIONS BELOW

The opinion of the district court (J.S. App. 3a-13a) is not yet reported. The decision and order of the administrative law judge (J.S. App. 16a-28a) is not reported.

JURISDICTION

The judgment of the district court was entered on May 7, 1979 (J.S. App. 1a-3a). A notice of ap-

peal to this Court was filed on May 17, 1979 (J.S. App. 14a-15a). On July 12, 1979, the Chief Justice extended the time for docketing the appeal to and including August 15, 1979. The jurisdictional statement was filed on that date, and this Court noted probable jurisdiction on November 13, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether Section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violations of the Act's child labor provisions, violates the Due Process Clause of the Fifth Amendment because it permits sums collected as civil penalties to be applied toward reimbursement of the costs of enforcing the child labor laws.

2. Whether, if the provision of Section 16(e) relating to the use of civil penalty funds violates due process, that provision is severable from the remainder of the section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law* * *.

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), provides in pertinent part:

> Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. * * * Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

29 U.S.C. 9a provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law,

for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

STATEMENT

1. Section 12 of the Fair Labor Standards Act, 29 U.S.C. 212, prohibits the employment of "oppressive child labor," as defined in the statute and the regulations promulgated by the Secretary of Labor under 29 U.S.C. 203(*l*). The Secretary may obtain injunctive relief to enforce this prohibition (29 U.S.C. 212(b), 217), and any person who willfully employs oppressive child labor may be subjected to criminal sanctions (29 U.S.C. 216(a); see 29 U.S.C. 215(a)(4)). Moreover, since 1974—when Congress amended the Act by adding Section 16(e)—the Secretary may assess a civil penalty of not more than $1,000 for each violation of Section 12 or the implementing regulations. Section 16(e) directs the Secretary, in determining the amount of the penalty, to consider "the size of the business of the person charged and the gravity of the violation * * *" 29 U.S.C. 216(e).

When the Secretary or his delegate assesses a penalty for child labor violations under Section 16(e), the employer has a right under the statute to file exceptions to the assessment. 29 U.S.C. 216(c). If an exception is not filed within 15 days of the Secretary's assessment, the assessment is deemed final. 29 U.S.C. 216(e). If an exception is filed, however, the existence of the violation and the amount of the

penalty are determined de novo by an administrative law judge after a hearing conducted pursuant to the Administrative Procedure Act (5 U.S.C. 554). 29 U.S.C. 216(e). In the de novo proceeding before the administrative law judge, the Secretary bears the burden of proof on contested issues of fact (29 C.F.R. 580.21(a)). The administrative law judge may uphold or reject the charges and may impose a penalty in any lawful amount not in excess of the assessment imposed by the Secretary. 29 C.F.R. 580.32(a). The decision of the administrative law judge constitutes the final administrative decision on the matter (*ibid.*), and an employer aggrieved by that decision may thereafter obtain judicial review (5 U.S.C. 702, 704).

Section 16(e) further provides that "[s]ums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title." 29 U.S.C. 9a, in turn, provides that the sums collected "shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency [within] the Department of Labor which supervised [the] work" and that such funds "may be used, in the discretion of the Secretary of Labor," to meet the expenses of that agency.

The Secretary has delegated his responsibility for enforcing the child labor provisions of the Fair Labor Standards Act to the Employment Standards Administration (ESA). 36 Fed. Reg. 8755 (1971).

The authority to make the initial assessment of civil penalties under Section 16(e) is exercised by ESA's assistant regional administrators.

2. Appellee operates a chain of restaurants in the southeastern United States (J.S. App. 4a). In 1975, following an investigation, the ESA assistant regional administrator in the Atlanta regional office determined that appellee had committed 169 separate violations of the child labor law. He announced an assessment of $103,000 in civil penalties against appellee for these numerous violations. Appellee filed exceptions to the regional administrator's determination and assessment (*ibid.*). After a hearing, the administrative law judge concluded that the existence of the violations was clearly established, but he reduced the penalty to $18,500 (J.S. App. 27a-28a).[1]

Appellee did not seek judicial review of the administrative law judge's ruling and, indeed, has never challenged the merits of that decision. Instead, appellee filed this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that Section 16(e) is unconstitutional and an injunction prohibiting its enforcement. Appellee contended that the reimbursement provision of the

[1] The assistant regional administrator had assessed a penalty of $84,500, in addition to the $18,500, because he concluded that the violations were willful. The violations were of the same type that had been discovered in several previous investigations of appellee's premises. The administrative law judge did not uphold this charge, however, ruling that it was not shown that the company had sufficient reason to know that the violations were recurring (J.S. App. 21a, 26a-27a).

statute (and, by reference, 29 U.S.C. 9a), which authorizes the allocation of civil penalty funds to the offices that investigate and assess penalties for child labor violations, creates an impermissible risk of decisional bias, in violation of the Due Process Clause.

The record developed in the district court established the following facts, which appellee did not dispute. Under the statutory scheme, the amount of monies collected as child labor penalties does not affect the compensation of any official involved in the assessment of those penalties or the investigation of the underlying violations.[2] For fiscal years 1976, 1977 and 1978, ESA collected the following approximate amounts in child labor civil penalties: $151,000 (FY 1976), $650,000 (FY 1977), and $592,000 (FY 1978).[3] In each of the three years, these amounts constituted less than 1% of the total funds appropriated to ESA by Congress.[4] Furthermore, in each of these years, ESA failed to spend the full amount appropriated to it, and the unexpended monies were returned to the Treasury. Indeed, in each year the amounts lapsed to the Treasury substantially ex-

[2] Defendants' Answer to Plaintiff's Interrogatory No. 2(h) (App. 27).

[3] Defendants' Answer to Plaintiff's Interrogatory No. 2(a) (App. 24). The fiscal year runs from October 1 to the following September 30. Although Section 16(e) became effective on May 1, 1974, no penalties were collected prior to July 15, 1975.

[4] *Budget of the United States Government, Fiscal Year 1979-Appendix*, pages 623-624; *Budget of the United States Government, Fiscal Year 1978-Appendix*, page 510.

ceeded the amounts collected in child labor penalties.[5] In other words, while it is theoretically possible for the challenged provisions of 29 U.S.C. 216(e) and 9a to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress, they have never had that effect.

In FY 1976 ESA allotted the amounts collected in child labor penalties to the ESA national office. In FY 1977 ESA allotted the penalties to the national office, to the Office of the Solicitor of Labor, and to the several regional offices in proportion to the amounts expended by those offices on child labor enforcement. The Atlanta regional office received an allocation of $39,200 in that fiscal year.[6] In FY 1978 and FY 1979 the penalties collected by ESA were held in the Treasury.[7]

Without disputing these facts, appellee moved for summary judgment. The district court granted the motion. Relying on *Tumey* v. *Ohio*, 273 U.S. 510

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[5] Defendants' Answer to Plaintiff's Interrogatory No. 2(b) (App. 24). In FY 1976, $981,000 lapsed to the Treasury; in FY 1977, $870,000; in FY 1978, approximately $4,600,000.

[6] Defendants' Answer to Plaintiff's Interrogatory No. 2(c) (App. 25). See also J.S. App. 9a n.6. The record does not indicate whether the FY 1977 allocations served to increase the funds that would otherwise have been available to each office for expenditure in that year. Although the Department of Labor's annual appropriation specifies the amount earmarked for ESA, it does not specify the amount allotted to each of ESA's regional offices.

[7] Defendants' Answer to Plaintiff's Interrogatory No. 2(c) (App. 25).

(1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the court stated that the provision of Section 16(e) relating to the use of civil penalties "creates a situation in which bias may creep into the decisions of the regional officials who impose those penalties" (J.S. App. 12a) and that the statute is therefore invalid under the Due Process Clause (*id.* at 13a). The district court appears to have reasoned that, under the reimbursement provision of Section 16(e), an ambitious assistant regional administrator, motivated by a desire to enlarge his bureaucratic domain, would have an incentive to assess a substantial penalty for child labor violations in the expectation, or hope, that ESA would return a portion of the penalties it collected to his office. The court apparently believed that this additional funding would enable the administrator to hire more personnel for child labor enforcement and that the statute thus "tends to make [the regional] offices partisan to maintain a high level of penalty assessment" (*id.* at 8a).

The district court acknowledged that the assessment of penalties by the assistant regional administrator is not final if challenged and that if the assessment is challenged it is subject to a de novo determination by an administrative law judge. The court also recognized that the Office of Administrative Law Judges receives no allotment of the child labor penalties and that there is no risk of bias or due process violation at the administrative law judge level (J.S. App. 10a). It nevertheless concluded that this safeguard does

not purge the statutory scheme of the alleged taint, because "unfairness at the 'trial' level cannot be corrected by the existence of appeal procedures, or even by the availability of a trial *de novo*" (*ibid.*).

Finally, although the district court held that it was the reimbursement provision of Section 16(e) alone that rendered the civil penalty statute unfair, and although it stated that it would be "simple and constitutionally sound [to] pay all civil money penalty funds directly into the Treasury of the United States" (J.S. App. 12a), the court did not limit its relief to declaring unconstitutional, and enjoining the enforcement of, the reimbursement provision. Instead, it permanently enjoined appellants "from enforcing section 16(e) * * * against [appellee] and * * * from requiring the payment of civil money penalties assessed against it" (J.S. App. 1a-2a; see also *id.* at 13a).

SUMMARY OF ARGUMENT

Section 16(e) of the Fair Labor Standards Act authorizes the assessment of civil penalties against persons who employ child labor in violation of the Act. The statute also provides that penalties collected for child labor violations may be allocated to the enforcement agency for such use as the Secretary directs. The district court erred in concluding that, because the initial assessment of penalties is made by the regional enforcement officers, the civil penalty provision violates due process by creating an impermissible potential for bias in penalty assessments.

The due process standards established in cases such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), on which the district court relied, are applicable only to officials exercising judicial or quasi-judicial functions. The court erred in applying those standards to the initial assessment of penalties by an Employment Standards Administration assistant regional administrator, who performs the function of a plaintiff or prosecutor rather than a judge. The penalty in any contested case is imposed by an administrative law judge, not by the assistant regional administrator, and there is no risk of improper bias in the de novo proceeding before the administrative law judge.

Moreover, even if the due process standards of *Tumey* and *Ward* are applicable to the initial assessment of civil penalties by the assistant regional administrator, the statutory scheme does not create an impermissible risk of personal bias in that assessment. Unlike the situation in *Tumey*, the compensation of the assistant regional administrator is unaffected by the assessment of penalties. And, unlike the situation in *Ward*, the penalties represent a minute fraction of ESA's funding; indeed, the agency has each year returned substantially larger sums to the Treasury in unexpended appropriations than it has collected in penalties. The likelihood that an initial penalty assessment by the assistant regional administrator will be the product of bias could hardly be more remote and attenuated.

Finally, even if the provision in Section 16(e) that provides for the allocation of penalties to enforce-

ment agencies creates an impermissible risk of bias and thus violates due process, the district court erred in declaring invalid, and enjoining enforcement of, the entire civil penalty scheme. The valid portion of the statute imposing civil penalties should be preserved even if the portion permitting allocation of the penalties to the enforcement agency is defective. The language, legislative history and context of the child labor statute support the presumption that Congress would have enacted Section 16(e) without the allocation provision rather than have no civil penalty enforcement scheme at all.

ARGUMENT

SECTION 16(e) OF THE FAIR LABOR STANDARDS ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), authorizes the assessment of civil penalties against persons who employ child labor in violation of the Act. The statute also provides that penalties collected for child labor violations "shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties * * *." *Ibid.* The district court held that Section 16(e) violates the Due Process Clause because the initial assessment of penalties under the Act is made by the regional enforcement officers who investigate child labor violations. The court reasoned that, under the standards of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409

U.S. 57 (1972), the reimbursement provision of the statute creates an impermissible potential for personal bias in penalty assessments.

The decision of the district court is erroneous for three separate reasons. First, we submit that the due process standards established in cases such as *Tumey* and *Ward* are applicable only to officials exercising judicial or quasi-judicial functions. Second, even if those standards apply to this situation, the court erred in concluding that the child labor civil penalty scheme creates a significant risk of personal bias. Finally, even if the reimbursement provision of Section 16(e) violates due process, the court should have enjoined only the enforcement of that provision and left the remainder of the statute in force.

A. Section 16(e) Is Not Invalid Under *Tumey* And *Ward* Because The Initial Assessment Of Penalties Is A Prosecutive, Not An Adjudicative, Function

The due process standards established in cases such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), are applicable only to officials exercising judicial or quasi-judicial functions. The district court erred in applying those standards to the initial assessment of penalties under Section 16(e) by an ESA assistant regional administrator, who performs the function of a plaintiff or prosecutor rather than a judge.

In *Tumey* and *Ward*, this Court reversed criminal convictions handed down by village mayors sitting as judges of the mayor's court. The Court held that the convictions entered in those contested proceed-

ings violated due process because, in *Tumey*, the mayor received a portion of the fines and costs he levied as personal income, and, in *Ward*, the mayor had primary fiscal and executive responsibility for the village, which was dependent on the fines he imposed for nearly half its revenue. Those circumstances, the Court held, created situations "which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused * * *." *Tumey* v. *Ohio*, *supra*, 273 U.S. at 532; *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 60.

The due process standard announced in *Tumey* and *Ward* is designed to avoid the possibility that personal bias may distort the truthfinding process in the adjudication of contested issues. These decisions are grounded in the common law principle that "[o]ne who stands to gain or lose personally by a decision either way is disqualified by reason of interest to participate in the exercise of *judicial* functions." 2 K. Davis, *Administrative Law Treatise* § 12.03, at 153 (1958) (emphasis supplied).[8] Thus, in *Tumey* the Court followed the "general rule" that "officers *acting in a judicial or quasi-judicial capacity* are disqualified by their interest in the controversy to be

[8] Professor Davis has observed that "[m]ost of the law concerning disqualification because of interest applies with equal force *to judges and to administrative adjudicators.*" K. Davis, *supra*, at 153 (emphasis supplied). See also *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973).

decided * * *," and it explained that the rule is necessary to prevent the temptation that personal interest might create for "the average man as a *judge* * * *." 273 U.S. at 522, 532 (emphasis added). Similarly, in *Ward*, the Court stated that "[t]he issue turns * * * on whether the Mayor can be regarded as an impartial *judge*." 409 U.S. at 59 (emphasis added).[9] The Court has since observed that these due process principles apply to "administrative agencies *which adjudicate* as well as to courts." *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975) (emphasis added). See also *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973) ("the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it"); *Bevan* v. *Krieger*, 289 U.S. 459, 465-466 (1933).

ESA assistant regional administrators do not act in a judicial or quasi-judicial capacity in making the initial assessment of child labor penalties under Section 16(e). These officers do not preside over hearings, nor do they make findings, based on evidence presented in an adversary context, on disputed questions of fact concerning either the existence of a violation or the proper penalty to be imposed. In issuing a notice of violation and penalty to an em-

[9] See also *Connally* v. *Georgia*, 429 U.S. 245 (1977), invalidating a scheme in which "the defendant is subjected to what surely is judicial action by an officer of a court who has 'a direct, personal, substantial, pecuniary interest'" in the matter. *Id.* at 250, quoting *Tumey* v. *Ohio*, *supra*, 273 U.S. at 523.

ployer (see 29 C.F.R. 579.5(a)), these officers exercise what is in effect a prosecutive function.[10] Their action is no different in substance from a government attorney's determination of what charges to bring in an indictment or what relief to seek in a civil complaint.[11]

When an assistant regional administrator assesses a penalty under Section 16(e), the employer has a right to file exceptions to the assessment. 29 U.S.C. 216(e). If the assessment is uncontested, that is, if

[10] See *Butz* v. *Economou*, 438 U.S. 478, 515 (1978) ("The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought").

[11] Appellee asserts (Motion to Affirm 17-18) that the function of the assistant regional administrator under Section 16(e) differs from that of a prosecutor because prosecutors are not required by statute to consider "the gravity of the violation" (29 U.S.C. 216(e)) in proposing criminal or civil charges. Appellee's assertion is incorrect both in general and in the particular context of the child labor laws. Prosecutors regularly must consider the gravity and nature of unlawful conduct in determining whether civil or criminal actions should be instituted and, if so, what charges to bring. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364-365 (1978); ABA Project on Standards for Criminal Justice, *Standards Relating To The Prosecution Function And The Defense Function* §§ 3.4., 3.9 (App. Draft 1971). In particu'ar, under Section 16(a) of the Fair Labor Standards Act, a prosecutor may seek a criminal fine only for willful violations of the Act and may seek imprisonment only for willful violators who have committed a prior offense under the Act. 29 U.S.C. 216(a).

an exception is not filed by the employer, the assessment becomes final by default without any adjudication.[12] *Ibid.* Adjudication of the violation occurs only

[12] The fact that the assistant regional administrator's initial penalty assessment becomes final under Section 16(e) if an exception is not filed does not make the notice of violation an "adjudication" or make the administrator a judge. The employer's failure to file an exception constitutes his consent to the charges, and the penalty may then be enforced in much the same manner as any consented forfeiture or settlement agreement. There is no need for an adjudication of charges that are undisputed, and it is not an adjudication for an administrative officer simply to allege that violations have occurred. Indeed, in *Ward*, this Court recognized that, even with respect to officials exercising clearly judicial functions, there is an important distinction between the determination of undisputed charges and adjudication of those same charges in a contested case. The Court there stressed that the question presented concerned "the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official * * * to accept a free and voluntary plea of guilty * * * or the like." 409 U.S. at 62 n.2.

The authority exercised by the assistant regional administrator under Section 16(e) is essentially identical in this regard to the authority exercised by the Secretary of Labor under Section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. 659(a). Under that statute, the Secretary may issue citations and penalties for violations and, "[i]f, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty * * * the citation and the assessment, as proposed, shall be deemed a final order * * * not subject to review by any court or agency." *Ibid.* If the notice of assessment under either 29 U.S.C. 216(e) or 29 U.S.C. 659(a) constitutes an "adjudication" simply because it becomes "final" if not con-

if the notice of penalty is contested. In that event, the existence of the violation and the amount of the penalty are determined de novo by an administrative law judge after a hearing conducted pursuant to the Administrative Procedure Act (5 U.S.C. 554). 29 U.S.C. 216(e). In the de novo proceeding before the administrative law judge, the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. 29 C.F.R. 580.21(a). The fact that the assistant regional administrator's role is essentially prosecutive and not adjudicative is emphasized by the Secretary's regulations, which state that the notice of penalty assessment and the exceptions filed to it "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding." 29 C.F.R. 580.3(b).[13]

The district court recognized that there are no "due process infirmities in child labor proceedings before the administrative law judge [in contested cases]" (J.S. App. 10a) because the reimbursement provision of Section 16(e) has no application to the

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tested, then due process presumably would require that notice and an opportunity to be heard be given *before* the initial assessment is proposed. But the initial assessment is *itself* the notice of violation (29 C.F.R. 580.3(b)), and it has never been held that notice and an opportunity to be heard must be given *before* a civil complaint may be filed.

[13] The administrative law judge may not impose a penalty in excess of the amount contained in the notice of penalty. 29 C.F.R. 580.32(a). This may explain the substantial disparity (see Motion to Affirm 4) between the amounts initially assessed and those finally imposed.

Office of Administrative Law Judges.[14] The court concluded, nevertheless, that fairness at the adminis-

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[14] Despite this ruling of the district court (J.S. App. 10a), and although it is undisputed that the Office of Administrative Law Judges has never been allotted penalty funds under Section 16(e) (J.S. App. 10a; App. 25), appellee claims (Motion to Affirm 8, 17) that the administrative law judges are personally biased because the statute requires that their Office be reimbursed for its services from penalties assessed under Section 16(e).

This contention reflects a misunderstanding of the statute. Far from requiring the distribution of penalty funds to the Office of Administrative Law Judges, the statute does not even permit it. Section 16(e) restricts reimbursement from penalty proceeds to offices that "supervised [the] work" of "determining the violations and assessing and collecting [the] penalties." 29 U.S.C. 216(e). The agency which supervised that work is the Employment Standards Administration, which does *not* include the Office of Administrative Law Judges. That Office is a separate administrative section within the Department of Labor, with a separate budget. See, *e.g.*, *Budget of the United States Government, Fiscal Year 1979—Appendix*, pages 623-624. Indeed, the Administrative Procedure Act, which governs contested proceedings under Section 16(e), requires this separation, because it expressly forbids an agency from placing its administrative law judges under the supervision or direction of those who perform investigative or prosecutive functions for the agency. 5 U.S.C. 554(d). Conversely, the Act disqualifies anyone involved in the investigation or prosecution of a case from participating in its administrative adjudication (*ibid.*). See *Withrow* v. *Larkin*, 421 U.S. 35, 51-52 (1975).

Because the Office of Administrative Law Judges is not a part of the agency that supervises the work of assessing and collecting the penalties, Section 16(e) does not permit the Office to receive penalty funds as reimbursement. Even if an alternative construction of the statute were possible, the fact

trative law judge level does not cure what it viewed as impermissible bias at the initial assessment stage, and it relied on this Court's holding in *Ward* that the absence of a neutral and detached judge at the first level of adjudication cannot be remedied simply by the availability of a second, de novo, level of adjudication (J.S. App. 10a). See 409 U.S. at 61-62. But this principle of *Ward* has no application to the assessment of penalties under Section 16(e) because, as we have already noted, the initial assessment made by the assistant regional administrator is not a level of adjudication at all. See also pages 31-32, *infra*. Thus, to the extent that the district court's decision may have been based on its view that the initial penalty assessment is equivalent to an adjudication at the first, or "trial," level, the court simply misconceived the statutory scheme.

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that it might (as appellee contends) create a serious doubt of the statute's constitutionality is sufficient reason not to adopt it.

> [If] a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

International Association of Machinists v. *Street*, 367 U.S. 740, 749 (1961), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). The construction that has been adopted by the agency entrusted with administering this statute is not only "fairly possible," but it reflects the ordinary meaning of the words Congress has employed. There is no reason to depart from the administrative interpretation in this case. See *Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip op. 10-13; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

To the extent that the district court's decision may have been based on the court's view that the due process standards established in *Ward* and *Tumey* are applicable to non-judicial, prosecutive functions, we submit that the court misapplied those decisions. In *Tumey*, the Court emphasized that the Due Process Clause does not require the same disinterest and neutrality from prosecutors that is required from judges, observing "that the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people." 273 U.S. at 535. Officials exercising prosecutive functions, whether in an administrative or judicial context, are not and should not be expected to be totally "neutral and detached judge[s]" of their own cases. *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 62. This Court often has recognized that prosecutors must have broad discretion in framing charges and requesting remedies (see, *e.g.*, *Butz* v. *Economou*, *supra*, 438 U.S. at 515; *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 365); in doing so, and in pursuing these cases to their conclusion, prosecutors may often be motivated by the kind of general ambition that the district court believed to be impermissibly fostered by the reimbursement provision of Section 16(e).

Although there unquestionably are constitutional limits to the discretion and partisanship of prosecutors, our adversary system presumes that government attorneys have at least some interest in the

success of their cases, and certainly have an interest greater than those responsible for adjudicating the cases. See *Withrow* v. *Larkin*, *supra*, 421 U.S. at 51-53. A holding that the standards of impartiality that this Court has applied to officials exercising judicial functions must apply equally to those exercising prosecutive functions would be incompatible with the very nature of the adversary system. Moreover, while a prosecutor may be barred—as a matter of common law policy or statute rather than due process—from initiating litigation in which he has a personal, pecuniary interest independent from the income that he receives for the performance of his office,[15] the fact that a government's attorney's salary may depend, in part, on fees obtained as a result of fines or money judgments is not a basis for disqualification due to bias. See *Tumey* v. *Ohio*, *supra*, 273 U.S. at 535; *Wyatt* v. *State*, 112 Tex. Cr. Rep. 280, 16 S.W. 2d 231 (1929); 27 C.J.S., *District & Prosecuting Attorneys* § 12(6)(b), at 664 (1959).

In sum, the Due Process Clause does not require enforcement officers to be wholly disinterested in the outcome of their investigations. Even though fundamental notions of fair procedure prohibit the exercise of "judicial power [by] one who by reason of his interest" cannot be impartial (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 535), Congress could, if it chose, "stimulate prosecutions [of child labor law violations] by offering [rewards] to those who shall initiate and carry on such prosecutions * * *" (*ibid.*).

[15] See, *e.g.*, 28 U.S.C. 528; *State* v. *Harris*, 477 S.W. 2d 42 (Mo. 1972); *State* v. *Cox*, 246 La. 748, 167 So. 2d 352 (1964) (prosecutor may not bring criminal libel charge where he had a personal interest in the verdict as the injured party); *May* v. *Commonwealth*, 285 S.W. 2d 160 (Ky. 1955) (prosecutor should not bring criminal assault charge where he had a personal interest in the verdict as the injured party); *Delk* v. *Commonwealth*, 243 Ky. 38, 47 S.W. 2d 957 (1932) (prosecutor who is involved in the offense under investigation may not conduct the prosecution).

B. Section 16(e) Is Not Invalid Under *Tumey* And *Ward* Because The Potential Bias Allegedly Resulting From The Reimbursement Provision Of The Statute Is Insubstantial And Remote

Even if the initial assessment of penalties under Section 16(e) by the assistant regional administrators were subject to the due process standards of *Tumey* and *Ward*, the statute would not violate the Due Process Clause. Due process does not prohibit the exercise even of judicial power by officers whose personal interest in the adjudication is "so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual." *Tumey* v. *Ohio*, *supra*, 273 U.S. at 531, quoting T. Cooley, *Constitutional Limitations* 594 (7th ed. 1903). If the alleged personal interest "is too slight to excite prejudice against a [party]" (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 529-530, quoting *Hesketh* v. *Braddock*, 3 Burrows 366 (S.C. 1847)), or lacks "sufficient substance" (*Gibson* v. *Berryhill*, *supra*, 411 U.S. at 579), the Due Process Clause does not require that the officer be disqualified even from making an adjudicative determination.

Dugan v. *Ohio*, 277 U.S. 61 (1928), which this Court distinguished in *Ward* (409 U.S. at 60-61), illustrates this point. In *Dugan*, the Court upheld a mayor's court conviction against a due process challenge. As in *Ward*, the fine imposed by the mayor in *Dugan* accrued directly to the city treasury. But, unlike in *Ward*, where the mayor had "wide executive powers" (409 U.S. at 58), the mayor in *Dugan* had "no executive, and exercised only judicial, functions." *Dugan* v. *Ohio*, *supra*, 277 U.S. at 63. The city manager, not the mayor, was "the active executive" (*ibid.*); the mayor was simply one member of a five-person commission that exercised all legislative and, together with the manager, all executive powers (*ibid.*). Moreover, although the mayor's salary was "paid out of a fund to which fines accumulated from his court * * * contribute, it is a general fund, and he receives [his] salary in any event, whether he convicts or acquits." *Id.* at 65. In these circumstances, the Court held that the mayor's relationship to the city's "executive or financial policy" was too "remote" to impute bias to him in his capacity as judge. *Ibid.* See also *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 61.[16]

[16] Similarly, in *Bevan* v. *Krieger*, *supra*, the Court upheld a state statute that authorized a notary public to imprison for contempt any witness who refused to testify at a deposition. The statute was challenged on the ground that the notary, who was paid for the testimony he transcribed, had a personal interest in compelling testimony, but the Court rejected the claim, holding that the notary's possible interest was "too remote and incidental to vitiate his official action" 289 U.S. at 466.

Although the district court correctly recognized that "the crucial consideration is the remoteness of the pecuniary interest" (J.S. App. 6a), it erred in striking down the civil penalty statute. The risk of bias created by the reimbursement provision of Section 16(e) is substantially less than that involved in *Tumey* and *Ward*, and, indeed, is considerably more remote than the danger of prejudice held to be constitutionally insignificant in *Dugan*.

In contrast to *Tumey*, no ESA official has a personal financial stake in his decision. See also *Connally* v. *Georgia*, 429 U.S. 245, 250 (1977); *Gibson* v. *Berryhill*, *supra*, 411 U.S. at 579. There is no evidence that sums collected as civil penalties increase the salaries of the administrators who assess them.[17] The situation here is thus entirely unlike *Tumey*, where the mayor was "paid for his service as judge [only if he] convict[ed] those who are brought before him." 273 U.S. at 520. See also *Connally* v. *Georgia*, *supra*, 429 U.S. at 250 (*Tumey* applies where a magistrate is paid "for his *issuance* of the warrant, and he receives nothing for his *denial* of the warrant"). Instead, the situation here is analogous to that in *Dugan*, where the Court held that the allega-

[17] Appellee claims that this case falls within the scope of *Tumey* because the penalties may be used to "reimburse [the] salaries" of the assessing officers (Motion to Affirm 23). This contention is incorrect. The salaries of the assistant regional administrators are fixed by law (see 5 U.S.C. 5332) and the penalties do not affect the level or availability of funding to pay these officers' wages. Moreover, as we note in the text, the penalties are not employed even indirectly to increase these officers' compensation.

tion of personal bias was insufficient because, even though the mayor's salary was paid out of a general fund to which the fines he levied contributed, "he receives [the same] salary in any event, whether he convicts or acquits." 277 U.S. at 65. The officers who make the initial penalty assessment under Section 16 (e) thus plainly lack any "substantial pecuniary interest" in the assessment that would disqualify them for personal bias or render any resulting judgment suspect under the Due Process Clause.

In addition, unlike in *Ward*, there is no realistic possibility that these officers' "executive responsibilities" (409 U.S. at 60) would influence their judgment in assessing penalties. Assistant regional administrators have no budgetary functions, and the penalties that are recovered do not accrue directly to their offices. Rather, the penalties are paid into a fund at ESA's national office in Washington, which determines whether and how to use them, subject to the approval of the Secretary of Labor (29 U.S.C. 9a; App. 24-27). The assistant regional administrator has considerably less executive and fiscal responsibility than the mayor in *Dugan*, who was one of the five members of the city's governing commission. Thus, even more clearly here than in *Dugan*, the assessing officers' "relationship to the finances and financial policy" of the agency that receives the funds is "too remote to warrant a presumption of bias." *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 60-61.

Moreover, in *Ward* and *Tumey*, the fines and costs assessed represented a "substantial" portion of the

village's total revenues, and there was direct evidence that responsible officials were concerned about the fiscal importance of that revenue source.[18] See *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. 58-59; *Tumey* v. *Ohio*, *supra*, 273 U.S. at 521, 533. Here, by contrast, the sums collected as civil penalties under Section 16(e) constitute a minute fraction—less than 1%—of ESA's national budget. See page 7, *supra*. Indeed, far from being fiscally dependent upon receipt of the penalties, ESA has each year lapsed unobligated funds to the Treasury in amounts greater than it has collected as civil penalties. *Ibid.* Even if (by hypothesis) ESA were to obtain substantial sums of money from penalty funds in some year, Congress might well simply appropriate a correspondingly lesser amount from general revenues for the operation of that agency in order to obtain the desired level of child labor enforcement. Congress ordinarily takes into account an agency's total resources and needs in making appropriation decisions. In context, then, these are "minor penalties * * * [that] do not involve any such addition to the reve-

[18] In *Ward*, the revenues from the mayor's court constituted approximately half of the town's income, and "[t]his revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice [about] the problem." 409 U.S. at 58. In *Tumey*, the mayor informed the village that he would continue to carry out the functions of the mayor's court "for village financial reasons" (273 U.S. at 521), and the facts showed that "substantial sums were expended out of the village treasury, from the fund made up of the fines thus collected, for village improvements and repairs" (*ibid.*).

nue of the [agency] as to justify the fear that the [assessing official] would be influenced in his * * * judgment by that fact." *Tumey* v. *Ohio*, *supra*, 273 U.S. at 534.

It is, in fact, exceedingly difficult to imagine how the statute would be likely to influence an assistant regional administrator's decision in the initial assessment of penalties. The official would have no basis for assuming that ESA would allocate *any* penalty funds to his regional office as the result of any assessment under Section 16(e), because ESA has allocated penalty payments to its regional offices only once since enactment of Section 16(e) and ordinarily has deposited the penalties in the Treasury. See pages 7-8, *supra*. Appellee is simply mistaken in contending (Motion to Affirm 7-8) that the statute *requires* the distribution of penalty funds to regional enforcement offices. 29 U.S.C. 9a, which is incorporated by reference in Section 16(e), provides that the penalty proceeds are to "be deposited to the credit of the appropriation of that bureau, service, office or division, or other agency of the Department of Labor which supervised [the determination of violations and the assessment and collection of penalties], and may be used in the discretion of the Secretary of Labor * * *."[19] This provision necessarily directs that re-

[19] The terms "bureau, service, office, division, or other agency" in 29 U.S.C. 9a refer not to each physical location at which a departmental unit establishes quarters but to the overall department unit itself. The departmental units to which the statute refers are necessarily those agencies that receive an appropriation directly from Congress, else it would

imbursement be made to the Employment Standards Administration itself and not to the several regional offices of that agency, because only ESA receives an "appropriation" to which the funds can be credited.[20] The regional offices do not receive an appropriation; instead, their expenses are provided for by the agency, with the approval of the Secretary, from the general ESA appropriation, and this allocation is made along whatever geographical and administrative lines the agency deems appropriate to accomplish its assigned responsibilities. Section 16(e) thus does not create any justifiable basis for regional administrators to believe that the penalties they assess will generate greater levels of funding for their particular regional office.

Furthermore, on the one occasion when ESA chose, in its discretion, to allocate civil penalty funds to its regional offices, it did so in proportion to the amount of money expended by each office in investigating and prosecuting child labor violations rather than in proportion to the level of penalties each office initially

be impossible to "credit * * * the appropriation" (*ibid.*) of the agency with the penalty proceeds. The statutory terms "bureau, service, office, division, or other agency" presumably derive from the fact that in 1934, when 29 U.S.C. 9a was enacted, administrative units with those designations (*e.g.*, Office of the Secretary of Labor, Children's Bureau, United States Employment Service) were the principal agencies within the Department of Labor and received appropriations directly from Congress. See *Budget of the United States Government, Fiscal Year 1935* at 393-406.

[20] See note 19, *supra*; *Budget of the United States Government, Fiscal Year 1979—Appendix*, pages 623-624.

assessed (J.S. App. 7a-8a; Defendants' Answers to Plaintiff's Interrogatories No. 2(d), 2(e), 2(g); App. 26-27). The decision of an assistant regional administrator to assess a heavy penalty in any case thus would not increase the allocation of funds to that region under Section 16(e).

It is perhaps theoretically possible that an assistant regional administrator might decide to expend more resources (*e.g.*, by hiring additional investigators) than his own budget would permit—a decision that might well be unlawful—in the hope that those expenditures would be funded by future allocations from his own penalty assessments. But this possibility is so attenuated and insubstantial, and rests upon a series of such increasingly improbable assumptions,[21] that it affords no basis for concluding that the statute that authorizes the initial assessment of penalties by enforcement officers violates the

[21] This possibility, which the district court apparently believed was significant, would require the assumptions that the assistant regional administrator's superiors would authorize him to increase the size of his staff and to increase child labor enforcement expenditures significantly in excess of his budget; that the regional office's pro rata portion of the aggregate penalty fund would be sufficient to cover those expenditures but would not be sufficient in the absence of that office's contributions to the funds; that the increased expenditures would uncover a correspondingly increased number of violations; that the administrative law judges would concur with the official's allegedly biased penalty assessments; and that ESA budget officers would decide in that year to allocate penalty funds to the regional office that made the allegedly biased assessments.

Due Process Clause. An interest that is "so remote [and] trifling" (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 531) "is too slight to excite prejudice" (*id.* at 530) and does not disqualify these officers for personal bias even under the due process standards applicable to persons performing judicial or adjudicative functions.

Finally, even if it were thought that this case presented a "[n]ice question[] * * * as to what the degree or nature of the interest must be [for the assessing officers to be disqualified for personal bias]" (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 522), there is an additional reason why Section 16(e) does not offend due process. Under this statute, any employer who contests the initial assessment made by the assistant regional administrator is entitled to a de novo hearing on all disputed issues before an administrative law judge. The administrative law judge, who clearly is not affected by the same alleged bias as the regional officer (J.S. App. 10a; see pages 18-20 and note 14, *supra*), may uphold or reject the charges and may impose a penalty in any lawful amount not in excess of the initial assessment (29 C.F.R. 580.32 (a)). Although the availability of de novo review by an impartial judge will not, by itself, preserve the constitutionality of a statute that directs a biased officer to preside over an initial hearing or trial (*Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 61-62), the availability of such review is plainly relevant in any case where the allegation of bias presents a difficult or "nice question" as to an officer's ability

to exercise his judgment without personal prejudice. See *Bevan* v. *Krieger*, 289 U.S. 459, 465-466 (1933).[22] The fact that the initial administrative assessment under Section 16(e) "is subject to [de novo] review" (289 U.S. at 466) before an impartial administrative law judge provides an additional assurance that the claimed bias will not distort the truth-finding function under the statute. The reimbursement provisions of Section 16(e) thus cannot be viewed as creating bias of "sufficient substance" (*Gibson* v. *Berryhill*, *supra*, 411 U.S. at 579) to offend notions of fair procedure, and hence a judgment requiring the payment of a civil penalty under the child labor statute does not violate due process.

C. Even If The Reimbursement Provision In Section 16(e) Is Unconstitutional, The Remainder Of The Civil Penalty Statute Is Valid And Should Be Left In Effect

Even if the portion of Section 16(e) that authorizes the application of civil penalties to reimburse agencies for enforcement efforts is unconstitutional, the district court erred in declaring the entire civil

[22] See also *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), where the Court refused to construe 5 U.S.C. 7501(a) to require that there be an impartial decisionmaker at a hearing *before* a federal employee is removed or suspended from service. Although there was no single opinion for the Court in *Arnett*, Mr. Justice Powell explained that neither the statute nor due process mandates that result because "an impartial decisionmaker is provided at the post-removal hearing where the employee's claims are finally resolved." 416 U.S. at 170 n.5. See also *Porter* v. *Califano*, 592 F.2d 770, 783 & n.22 (5th Cir. 1979).

penalty scheme unconstitutional and enjoining further enforcement of the statute. The court instead should have severed the reimbursement provision from the statute and given effect to the remainder of the civil penalty scheme. It is the settled rule that:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). Accord, *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). In this case, it is apparent that the reimbursement provision in Section 16(e) is severable from the remainder of the statute and that what remains is "fully operative as a law."

As the district court recognized, it would be "simple and constitutionally sound [for] all civil money penalty funds [to be paid] directly into the Treasury of the United States" (J.S. App. 12a). That is the result that would obtain if the reimbursement provision in Section 16(e) were declared invalid and the remainder of the statute were left in effect.[23] There is, moreover, nothing to suggest that Congress would have preferred to "eliminate its policy altogether"

[23] The reimbursement provision is wholly contained in the last sentence of Section 16(e). The remainder of this section, which relates to the imposition of the penalty, would remain fully operative if the allegedly defective reimbursement provision were excised.

(*Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring)) rather than simply excise the claimed constitutional defect. To the contrary, there is strong evidence that Congress would have enacted Section 16(e) without the reimbursement provision rather than forego entirely any civil penalty system for enforcing the child labor prohibitions in the Act.

First, Section 19 of the Act provides that "[i]f any provision of [the Act] or the application * * * to any person or circumstance is held invalid, the remainder of [the Act] and the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C. 219. Because Congress has expressed its intent to preserve any constitutional portion of the Act whenever possible, "when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

Second, the legislative history of Section 16(e) makes clear that the overriding concern of Congress in enacting the statute was to improve compliance with the child labor laws by imposing civil penalties for violations and that the reimbursement provision was merely incidental to this concern. The Senate Report on the 1974 Amendment that added Section 16(e) states that the purpose of the civil penalty provision is "to strengthen and promote vigorous enforcement of the child labor restrictions" (S. Rep

No. 93-690, 93d Cong., 2d Sess. 29 (1974)), and Senator Dominick remarked on the Senate floor that the civil penalty was adopted to "tighten[] up enforcement of the child labor provisions" (119 Cong. Rec. 14453 (1973)). This objective obviously would be frustrated if the civil penalty scheme were held unconstitutional in its entirety, because in that event enforcement of the child labor prohibitions would be left to the injunctive and criminal sanctions that Congress had previously determined to be inadequate. See page 4, *supra*. Severing the reimbursement provision from the remainder of Section 16(e), however, would have little if any adverse effect on attainment of the congressional goal.[24] Indeed, the legislative history contains no reference whatever to the reimbursement provision itself.

Finally, Congress has not included a similar reimbursement provision in analogous civil penalty statutes, such as the Occupational Safety and Health Act (29 U.S.C. 666(k)) or the Coal Mine Health and Safety Act (30 U.S.C. 819(a)). In these circumstances, we submit that it is exceedingly improbable that Congress would have declined to enact the civil penalty provisions of Section 16(e) in the absence of the reimbursement clause.

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[24] As we have discussed at pages 26-30, *supra*, the reimbursement provision has no discernible, practical effect on enforcement efforts.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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